



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT  
MILIMANI COMMERCIAL COURTS, NAIROBI  
HCCC NO. 70 OF 2000**

**TOTAL KENYA LIMITED.....PLAINTIFF**

**V E R S U S**

**SHABBIR MOTORS SPARES LIMITED.....DEFENDANT**

**R U L I N G**

This application is brought by way of a chamber summons dated 29th September, 2004 and filed in court on 30th September, 2004. It is expressed to be brought under O.VI Rule 13 (I)(d) of the Civil Procedure Rules, and all enabling provisions of the law.

It seeks two orders-

1. THAT the plaint dated be struck out (sic) and the suit be dismissed for being an abuse of the process of the court.
2. THAT the respondent do bear the costs of this application and those of the entire suit.

The application is based on the grounds that the sum claimed in the suit has been settled in full by direct payments to the plaintiff and through the plaintiff's debt collector; that the plaintiff's claim is therefore an abuse of the court process, and that the suit subjects the defendant to double jeopardy with regard to payment of the debt and costs in terms of time and money spent in defending the suit. The defendant/applicant therefore contends that it is in the interest of justice to dismiss the suit upon striking out the plaint. The application is also supported by the annexed affidavit of SHABBIR MOHAMMED ALI KHATAU, the managing director of the defendant/applicant.

The plaintiff/respondent opposes the application on the grounds that-

1. There are no grounds in law or fact to entitle the defendant to the prayers sought.
2. The plaintiff has a bona fide and strong case and the issues arising therefrom ought to be ventilated and determined at a full trial as opposed to the summary procedure that the applicant seeks to rely on.
3. The application is brought in bad faith and is merely an attempt to intimidate and harass the plaintiff and is itself an abuse of court process.
4. The plaintiffs are guilty of material non-disclosure and have not come to court with clean hands, and the applicant is therefore undeserving of the remedy it seeks from the court.
5. The ruling of Justice Ringera delivered on 6th July, 2001, has already answered the question of

whether or not this suit can be dealt with summarily as proposed by the defendant. The issues raised by the application are therefore *res judicata*.

Appearing for the applicant, Mr. Jaoko stated that the plaintiff claims Ksh.936,129.65 as per the plaint, and 32% interest on that principal amount. He submitted that the sum which was payable to the plaintiff had been fully paid. He referred to a letter dated 4th December, 1999 wherein it was admitted that the amount collected was Ksh.1,155,000.00 while the claim was for Ksh.980,000/=, and that the excess was due to cheques unpaid by Delphis Bank as it was going under. The payment of Ksh.980,000 was full and final and that there was no further claim.

With regard to the claim for 32% interest on principal, he submitted that there was no agreement between the parties for levying interest, and that the figure is arbitrarily applied by the plaintiff. Counsel then referred to **D.T. DOBIE & CO. (KENYA) LTD. v. MUCHINA** [1982] KLR. 1 and submitted that this is a plain and obvious case whereby the plaintiff is abusing the court process by seeking to be paid moneys which have already been paid to its agent and thereby subjecting the applicant to double jeopardy of having to defend claims which have already been settled. He requested the court to grant the orders as prayed.

In her response for the plaintiff/respondent, Ms. Muriu submitted that the authority cited by Mr. Jaoko supported her position, and that courts should aim at sustaining suits rather than applying summary procedure to terminate them. She therefore opposed the application and submitted that the issues raised therein were *res judicata* since Justice Ringera, as he then was, had ruled on 6th July, 2001, that this suit was not plain and obvious and could not be dealt with summarily. She further submitted that this suit was ready for trial before the filing of this application, and therefore the application was not brought in good faith. Ms. Muriu further submitted that the applicant had not disclosed that some of the cheques issued to the plaintiff had been returned unpaid, and this happened even after the filing of the suit. The applicants were therefore guilty of no-disclosure and were consequently undeserving of the judicial discretion of the court. She asked the court to dismiss the application with costs.

In a short reply, Mr. Jaoko submitted that Justice Ringera's ruling was made in an application by the plaintiff for summary judgment and that this would not bar the defendant from making this application. The application before Justice Ringera was under O.XXXV, while the application before this court is under O.VI of the Civil Procedure Rules. Counsel thereupon asked for orders as prayed.

After perusing the application and its supporting documents, and after hearing counsel for the rival parties, I note that this application was filed under HCCC No.70 of 2000 yet the chamber summons in respect thereof requires all parties to attend the Honourable Magistrate in chambers for the hearing of the application for the orders sought! But no matter.

The main ground upon which the applicant bases its claim is that it has already paid all debts due to the respondent through the respondent's debt collector. It relies for this stand on a letter dated 4th December, 1999, addressed by Corporate Credit Management Limited, the respondent's agents for the purpose of collecting the debt, addressed to the applicant. The letter sets out payments made by various cheques, all amounting, in my computation, to Ksh.485,000.00, and other sums paid in cash amount to Ksh.675,000.00. In the penultimate paragraph of that letter, Ms. Irene Kanyua, the writer states-

**“The total amount of Ksh.1,155,000/= had been received by us against a total amount of outstanding bill of Ksh.980,000/=. The excess amount received is for unpaid cheques of Delphis Bank that was going under as per your instructions that there were problems of clearance by the above mentioned bank and these particular cheques have not been returned to you but the subsequent cash payment voucher numbers 2613 and 2602 refers to the same cash payments received.”**

N According to my computation, the total sum embraced in the figures tabulated is Ksh.1,160,000/= and not Ksh.1,155,000/= as stated in the above paragraph. Assuming that the sum of Ksh.1,155,000/= represents the correct total, and cash payments in respect of voucher numbers 2613 and 2602 were meant

to replace the unpaid Delphis Bank cheques, there is still an unexplained excess of Ksh.25,000/= over and above the alleged total amount of outstanding bill of Ksh.980,000/=. If, however, my computation is correct, and I think it is the correct one, the sum paid was Ksh.1,160,000/= against an outstanding bill of Ksh.980,000/=. After deducting the amount of the outstanding bill, and the Ksh.150,000/= representing voucher numbers 2613 and 2602, this total still leaves unexplained an excess of Ksh.30,000/=. The figures in this letter are questionable.

Secondly, by an application dated 5th July, 2000, and filed in court on 14th July, 2000, the plaintiff/respondent herein applied for summary judgment in this matter. The application came for hearing on a date which is not clear, but which counsel for the respondent said from the bar was 6th July, 2001. It is notable that the issue of the applicant having paid all the sums due and payable was never mentioned, even though the applicant was, or ought to have been in possession of the letter dated 4th December, 1999.

Thirdly, the correspondence between the parties, as per the applicant's bundle of documents, suggests that even after the suit had been filed, the applicant made some payments by way of cheques in or about October, 2000. It is not of much consequence whether the cheques were paid or not. It is significant, however, that this was long after the letter dated 4th December, 1999, which is the applicant's triumph card. Even though the correspondence does not disclose expressly what the payment was for, one question still stands – if the defendant/applicant had fully paid the debt owing as of 4th December, 1999, then the subsequent payment after institution of the suit requires explanation. Otherwise what was it in respect of?

Fourthly, by a letter dated 23rd October, 2000, the then advocates for the plaintiff/respondent wrote to the applicant's advocates stating, *inter alia*-

**“We are still waiting to receive a schedule of how much is alleged to have been paid to Total Kenya Limited. Please let us have the said schedule urgently to enable us arrive at a settlement before 1st December, 2000 when this matter is scheduled for mention.”**

This letter does not seem to have been responded to. However, responding to another letter from the respondent's advocates dated 4th September, 2000, the applicant's advocates wrote on 1st November, 2000 *inter alia*-

**“Kindly find herein a schedule of payments made to Corporate Credit Management, more specifically, a person known as Irene...”**

The letter then goes on to tabulate the amounts of cash and cheques paid to the aforesaid company which was the plaintiff's agents, and the total thereof is Ksh.565,000.00. The unanswered question raised by this figure is – why is this sum at such a great variance with the sum of Ksh.1,155,000.00 stated in the letter dated 4th December, 1999, having been paid?

The answer to the above rhetorical questions is not far to seek. It is simply not possible for this matter to be decided on affidavit evidence. The applicant himself seems to be aware of this. In his response to the respondent's application for summary judgment, he swore and filed a replying affidavit on 30th January, 2001, in which he averred in paragraphs 7 and 9, *inter alia*

**“7. That in view of the above payments made, I would crave the court's leave for this matter to go for full trial to enable us obtain copies of the cheques from my banks to prove payments.  
9. That I do aver that truly this is not a clear cut case for summary judgment due to there being issues that need to be controverted at the main trial by way of Viva Voce.”**

The learned judge who heard the application for summary judgment agreed with the above sentiments which I find as applicable to the present application for striking out the plaint as they were to the application for summary judgment. They go a step further. They also apply to the dispute as to the rate of interest which has not been resolved by affidavit evidence.

Finally, I note from the record that the parties herein filed their lists and bundles of documents way back in February, 2002. No doubt this was done in readiness for the full scale hearing of the suit. That per se, does not preclude any party from applying under O.VI Rule 13 of the Civil Procedure Rules for striking out or amending any pleading as this can be done “at any stage of the proceedings.” However, given the discrepancy printed out in the figures tabulated in the letter dated 4th December, 1999 and considering the fact that the applicant continued to pay some money even after the filing of the suit, the letter dated 4th December, 1999, cannot, without scrutiny by viva voce evidence, qualify for anyone’s imprimatur at this stage.

The application for striking out the plaint is not merited and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 14th day of March 2005

**L. NJAGI**

**JUDGE**